IS ALIMONY A DEBT?—In the recent case of *Adams* v. *Adams* (N. J. 1912) 83 Atl. 190, it was adjudicated that the enforcement of a decree for the payment of alimony by attachment for contempt was not prohibited by a constitutional provision forbidding imprisonment for debt. Although well in accord with authority,[1] the decision is illustrative of the problems which arise in the process of defining a peculiar and anomalous right, and invites that inquiry into its historical origin and fundamental characteristics which the solution of such problems necessarily requires.

The ecclesiastical courts of England, which until recently had exclusive jurisdiction over divorce, perceived the obvious necessity of providing by some method for the future support of the wife. Inasmuch as these courts did not recognize absolute divorce but granted only a judicial separation *a mensa et thoro,* which stopped short of severing the marriage bond, it was natural to decree that the husband remain under his common law duty to support the wife.[2] That the obligation to pay alimony sprang from and never existed independently of this duty of support is further evidenced by the fact that alimony was never awarded to the husband, since the common law saw no duty on the part of the wife to support him.[3] Again, the decree never awarded a lump sum or a definite portion of the estate, but always required periodic payment in the form of an allowance.[4] Thus, it merely fixed in the form of a continuing obligation, the general duty of support which had previously been subject to the husband's discretion.[5] It follows that no maintenance was ever awarded when the marriage was annulled as void *ab initio,* since the only duty on which it could be predicated never existed.[6] But when absolute divorce found universal recognition both in this country and in England, the alimony then awarded naturally assumed the characteristics impressed upon it by the ecclesiastical courts in the case of limited divorce. This fact is strikingly illustrated by the attitude of most modern jurisdic-

[1]Rapalje, Contempts, 181. Carlton *v.* Carlton (1871) 44 Ga. 216; *Ex parte* Perkins (1861) 18 Cal. 60; Hurd *v.* Hurd (1896) 63 Minn. 443. A few cases reach a contrary result. Blake *v.* People (1875) 80 Ill. 11; Coughlin *v.* Ehlert (1866) 39 Mo. 285; Steller *v.* Steller (1872) 25 Mich. 159. But as even these admit that imprisonment would be decreed if the defendant were shown to be unable to pay, they differ from the majority only in shifting the burden of proof, compelling the petitioner to show affirmatively the obligor's ability to perform. See also *Ex parte* Davis (1908) 101 Tex. 607, which distinguishes imprisonment for failure to pay a voluntary agreement to pay alimony, though the agreement was incorporated in the divorce decree. *Ex parte* Gerrish (1900) 42 Tex. Cr. 114.

[2]Stewart, Mar. & Div. § 362; Bowman *v.* Worthington (1867) 24 Ark. 522; see Fischli *v.* Fischli (Ind. 1825) 1 Blackf. 360, 364, 365.

[3]1 Bishop, Mar. Div. & Sep. § 1184. This rule has been changed by statute in a few jurisdictions. I Bishop, *op. cit.* § 1387; see Livingston *v.* Superior Court (1897) 117 Cal. 633.

[4]2 Bishop, *op. cit.* § 834, 835; but *cf.* Ross *v.* Ross (1875) 78 Ill. 402. None was awarded, however, if the wife had other means of support either provided independently by the husband or derived from her own estate. Stewart, *op. cit.* § 372; Wilson *v.* Wilson (1797) 2 Hagg. Consist. 203.

[5]Romaine *v.* Chauncey (1892) 129 N. Y. 566; see Audubon *v.* Shufeldt (1900) 181 U. S. 575.

[6]2 Bishop, *op. cit.* § 855.

tions in refusing to entertain an independent suit for maintenance.[7] A few courts have tried to justify the result by the consideration that the questions involved cannot be suitably determined except in divorce proceedings.[8] Others, however, have openly discarded as outgrown this lingering survival of an earlier conception and have courageously taken the broader view that by entertaining in an independent suit a wife's petition for support, actual divorce may often be averted.[9]

It is due to this inherent character of alimony as the counterpart of an inchoate and undefined duty of support, that the obligation to pay and the corresponding claim for alimony have become anomalous in our law. It would have been natural to consider the claim a contract right arising from the civil contract of marriage.[10] It could have been deemed a property right analogous to a claim for dower.[11] Again, since in general only the innocent spouse is awarded alimony it might have been awarded as damages for the other's tortious conduct. But the peculiar interest of society in providing for the continued support of the wife prevented the alignment of alimony with any other interest known to our law.[12] This consideration at once explains and justifies the strongly prevailing view, as evidenced by the principal case, that alimony is not a debt within the intention of the framers of the constitutional prohibitions against imprisonment.[13] Thus, too, is explained the well-nigh universal holding that the obligation is not provable in bankruptcy or discharged thereby.[14] A few courts have based a contrary opinion[15] on phrasing which includes debts "which are a fixed liability, as evidenced by a judgment * * *."[16] But they lose sight of the fact that alimony is not a "fixed liability" since the sum decreed to be paid can be changed by the court, and even the amount of arrears may be reduced.[17] In other instances, however, the judicial attitude on the general question involved has not been entirely consistent. Since assignment of a claim for future alimony would divert payment from support of the wife and thus frustrate the purpose of society, such claim is so far distinguished from a debt as to be deemed a right purely personal to the wife, and

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[7]Fischli *v.* Fischli *supra;* Ramsden *v.* Ramsden (1883) 91 N. Y. 281.

[8]Trotter *v.* Trotter (1875) 77 Ill. 510.

[9]*In re* Popejoy (1899) 26 Col. 32; Murray *v.* Murray (1887) 84 Ala. 363.

[10]Tyler *v.* Tyler (1896) 99 Ky. 31; see Stearns *v.* Stearns (1893) 66 Vt. 187.

[11]Audubon *v.* Shufeldt *supra;* Lyon *v.* Lyon (1851) 21 Conn. 185.

[12]The same causes seem to have produced the similarly anomalous character of the beneficiary's interest in a life insurance policy. 12 COLUMBIA LAW REVIEW 551; see Romaine *v.* Chauncey *supra.*

[13]Note 1 *supra.* The inconsistency of cases represented by the recent decision of Hayes *v.* Hayes (1912) 135 N. Y. Supp. 225, which refuse after termination of a divorce suit to imprison for unpaid arrears of alimony *pendente lite,* is only apparent, since all provisional orders necessarily fall when the action ceases to exist.

[14]Deen *v.* Bloomer (1901) 191 Ill. 416; Audubon *v.* Shufeldt *supra;* Maisner *v.* Maisner (N. Y. 1901) 62 App. Div. 286.

[15]*In re* Houston (1899) 94 Fed. 119; *In re* Van Orden (1899) 96 Fed. 86.

[16]30 U. S. Stat. at L. ch. 541 § 63 a.

[17]Cohen *v.* Cohen (1906) 150 Cal. 99; Campbell *v.* Campbell (1875) 37 Wis. 206.

not assignable.[18] On the other hand,[19] as the same reasoning does not apply to a claim for accrued alimony, since obviously the support of the wife has already been accomplished in some manner, many courts allow her to treat it as a debt and to assign this surplus as she pleases.[20] Its character as a debt rather than a mere personal claim is again asserted in the decisions which allow arrears due at the husband's death to be recovered from his estate,[21] as well as in those cases which give to the deceased wife's representatives a right of recovery.[22]

[18]A contract before divorce to transfer a portion of any alimony received is open to the additional objection of being contrary to public policy by hindering reconciliation. Jordan *v.* Westerman (1886) 62 Mich. 170.

[19]*In re* Robinson (1884) L. R. 27 Ch. Div. 160; Lynde *v.* Lynde (1902) 64 N. J. Eq. 736; *contra,* Fournier *v.* Clutton (1906) 146 Mich. 298. The claim for future payments is not even a property right to the extent that that it is barred by a general ante-nuptial contract. Logan *v.* Logan (Ky. 1841) 2B. Mon. 142; Stearns *v.* Stearns *supra.*

[20]Stevenson *v.* Stevenson (1884) 34 Hun. 157; Sheffer *v.* Boy (1888) 5 Pa. Co. Ct. 158; see Watkins *v.* Watkins, L. R. [1896] Prob. Div. 222.

[21]Burdick, Law of Torts (2nd ed.) 228.

[22]Francis *v.* Francis (Va. 1879) 31 Gratt. 283; Sloane *v.* Cox (Tenn. 1817) 1 Hayw. 75; Knapp *v.* Knapp (1883) 134 Mass. 353.